CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Brunel University Research Archive

"North of the Border and Across the Channel": Custodial Legal Assistance Reforms in Scotland and France

Dr Dimitrios Giannoulopoulos

Lecturer and Associate Director, Criminal Justice Research Centre, Brunel Law School

Criminal procedure; France; Police interviews; Right of access to legal advice; Right to fair trial; Scotland

Summary

This article contrasts the Scottish reform of custodial legal assistance introduced subsequent to the Supreme Court's decision in Cadder *with similar developments in France. It offers a comparative viewpoint for the analysis of criticism directed at* Cadder *and opens up vistas of possibility for the consideration of further reform. The article also invites reflection on the significance of the developments in Scotland and France for custodial legal assistance in England and Wales.*[1]

Introduction

The decision of the Supreme Court in *Cadder v HM Advocate*[2] had profound consequences for the law of custodial interrogation in Scotland. Applying *Salduz v Turkey*[3] the Supreme Court held that compatibility with art.6 of the Convention required that contracting states organise their systems in such a way as to ensure that "a person who is detained has access to advice from a lawyer before he is subjected to police questioning".[4] From this it followed that the relevant Scottish legislation,[5] allowing for the detention and questioning of suspects for a period of up to six hours with no access to legal advice, was the very converse of what is required by the right to fair trial.[6] As a result of *Cadder*, the Scottish Government rushed through emergency legislation, recognising suspects' right to have a private consultation with a solicitor before any questioning begins and at any other time during such questioning.[7] The legislation also increased the period of detention to

[1] I am most grateful to Andrew Choo, Peter Duff, Stewart Field and the anonymous referees for their comments on previous written versions. Errors that remain are my responsibility.
[2] *Cadder v HM Advocate* [2010] UKSC 43; 2010 S.L.T. 1125.
[3] *Salduz v Turkey* (2008) E.H.R.R. 421.
[4] *Cadder* [2010] UKSC 43 at [48].
[5] Sections 14 and 15 of the Criminal Procedure (Scotland) Act 1995.
[6] *Cadder* [2010] UKSC 43 at [93].
[7] Criminal Procedure (Scotland) Act 1995 s.15A(3), as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).

12 hours,[8] with the possibility of extension for another 12 hours.[9] Subsequently, the Justice Secretary appointed Lord Carloway to conduct a review of key elements of Scottish criminal law and practice (the Carloway Review).[10] The Government has now accepted the broad reasoning as set out in the Carloway Report and is intending to introduce legislation based around the Report's recommendations.[11] Just as this was happening the Supreme Court has also brought precision to a number of issues left unresolved by *Cadder*, in the cases known as "sons of *Cadder*".[12]

Around the same time as the reforms in Scotland, the *Conseil constitutionnel* (Constitutional Council) in France found that most of the provisions of the Code de procédure pénale (Code of penal procedure) on custodial legal assistance were in violation of the Constitution. Suspects questioned by the police in the context of the *garde à vue* (the detention and questioning of suspected offenders by the police)[13] did not have the benefit of effective assistance from a lawyer and were not notified of their right to remain silent.[14] *Salduz* figured prominently in the debates at the *Conseil constitutionnel*.[15] Its decision, along with various decisions of the *Cour de cassation* (the French "supreme court"), led to the introduction of legislation, on April 14, 2011,[16] recognising for the first time the right of suspects to be assisted by a lawyer during questioning. Until then, suspects were only allowed to have a 30-minute consultation with their lawyer at the beginning of the *garde à vue*. Condemnation by the ECtHR a few months earlier, in *Brusco v France*,[17] had considerably accelerated the reform process, obliging the French government to overcome its originally reluctant approach to recognising a more important role for lawyers at the police station.

As expected, *Cadder* generated considerable scholarly debate, north and south of the border. In the *Edinburgh Law Review*, it was described as "one of the most important, and almost certainly the most controversial, decision handed down 'from London'".[18] In two articles recently published in the *Criminal Law Review*, the authors were critical of the Supreme Court's decision, inter alia for taking "an inappropriately narrow view of Scots law", attempting "an inappropriate homogenisation of criminal procedure" and "risking a diminution of the rights of suspects in Scotland".[19] In the more recent article, it was argued that some of the

[8] Criminal Procedure (Scotland) Act 1995 s.14, as amended by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.3(1).

[9] Criminal Procedure (Scotland) Act 1995 s.14A, as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.3(2).

[10] *The Carloway Review, Report and Recommendations*, November 17, 2011, available at *http://www.scotland.gov.uk/About/Review/CarlowayReview* [Accessed February 20, 2013].

[11] The Scottish Government, *Reforming Scots Criminal Law and Practice: The Carloway Report — Scottish Government Consultation Paper*, paras 1.8–1.10, July 2012, available at *http://www.scotland.gov.uk/Publications/2012/07/4794* [Accessed February 20, 2013].

[12] *Ambrose v Harris* [2011] UKSC 43; [2011] 1 W.L.R. 2435; *HM Advocate v P* [2011] UKSC 44; [2011] 1 W.L.R. 2497; *McGowan v B* [2011] UKSC 54; [2011] 1 W.L.R. 3121; *Jude (Raymond) v HM Advocate* [2011] UKSC 55; [2012] S.L.T. 75.

[13] See art.62-2 CPP (Code de procédure pénale).

[14] *Conseil constitutionnel*, Décision n° 2010-14/22 QPC du 30 juillet 2010 at [28].

[15] See the video recordings of the public audience of July 20, 2010, available at *http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/acces-videos/decisions/2010/affaires-n-2010-14-qpc-et-n-2010-22-qpc.48722.html* [Accessed February 20, 2013].

[16] Loi n° 2011-392 du 14 avril 2011 relative à la garde à vue.

[17] *Brusco v France*, App. no 1466/07 (ECtHR, October 19, 2010) at [45].

[18] "Symposium—Cadder v HM Advocate" (2011) 15 Edin. L.R. 275.

[19] See R.M. White and P.R. Ferguson, "Sins of the Father? The 'Sons of *Cadder*'" [2012] Crim. L.R. 357, 358, summarising the main suggestions made in an earlier article: P.R. Ferguson, "Repercussions of the *Cadder* Case: the

dangers deriving from *Cadder* now seem to have receded as a result of the "sons of *Cadder*" cases, where the Supreme Court was allegedly less adamant about taking an internationalist and due process orientated approach to custodial interrogation.[20] In contrasting the Scottish and French reforms, this article offers a comparative standpoint for the analysis of criticism directed at *Cadder* and the ensuing emergency legislation, and allows reflection on further reforms required in both Scotland and France.

Resisting the right to legal advice

The 2010 Act in Scotland and the April 2011 legislation in France have broken with a past of resistance to allowing suspects access to legal advice at the police station. Lord Rodger's historical analysis in *Cadder* reveals the extent of such resistance in Scotland.[21] Lord Rodger attached particular weight to the Thomson Committee's recommendation that a solicitor should not be permitted to participate in police investigations before charge, since the main purpose of interrogation—obtaining from the suspect any information that he might possess regarding the offence—might otherwise be defeated.[22] This recommendation was turned into s.3 of the Criminal Justice (Scotland) Act 1980—later consolidated into s.15 of the Criminal Procedure (Scotland) Act 1995—which allowed for the detention and questioning of suspects for up to six hours without access to a solicitor. As Lord Rodger observed, s.15 was specifically designed to deprive

> "the suspect of any right to take legal advice before being questioned by the police, in the hope that, without it, he will be more likely to incriminate himself during questioning".[23]

This meant that "the rights of the detainee were to take second place to the public interest", added Lord Hope, also in *Cadder*.[24] The police could question the suspect "without being deflected from their task by the presence of a solicitor".[25]Section 15 survived challenges in Scottish courts[26] until *Salduz* and *Cadder* finally led to recognition, with the 2010 Act, of a right to legal advice.

Review of the historical development of custodial legal advice in France paints a similar picture of systemic opposition to access to such advice. The police station remained "almost completely closed to lawyers"[27] until the beginning of the 90s, when the Delmas-Marty Commission recommended that lawyers should be given the right to be present during questioning.[28] Legislation was then introduced, in August 1993, giving suspects the right to consult with a lawyer, but only *for thirty*

ECHR's Fair Trial Provisions and Scottish Criminal Procedure" [2011] Crim. L.R. 743. See also P.R. Ferguson and F.E. Raitt, "A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report" [2012] Crim. L.R. 909, which contains a brief analysis of the recommendations of the Carloway Report on the provision of legal advice.

[20] White and Ferguson, "Sins of the Father? The 'Sons of *Cadder*'" [2012] Crim. L.R. 357, 366.

[21] *Cadder* [2010] UKSC 43 at [74–92].

[22] *Cadder* [2010] UKSC 43 at [91].

[23] *Cadder* [2010] UKSC 43 at [91].

[24] *Cadder* [2010] UKSC 43 at [23].

[25] *Cadder* [2010] UKSC 43 at [23].

[26] See *Paton v Ritchie* [2000] J.C. 271; 2000 S.L.T. 239; *Dickson v HM Advocate* [2001] J.C. 203; 2001 S.L.T. 674; *HM Advocate v McLean* [2009] HCJAC 97, 2010 S.L.T. 73.

[27] R. Vogler, "Reform Trends in Criminal Justice: Spain, France and England & Wales", 4 Wash. U. Global Stud. L. Rev. 631, 635 (2005).

[28] *Commission justice pénale et droits de l'homme* (Paris: La documentation française, 1991), p.113.

minutes, twenty hours into the garde à vue.[29] Not only this, but in a range of cases deemed exceptional the suspect could not meet his lawyer until 36 hours or even 72 hours of *garde à vue* had elapsed.[30] Then in June 2000 suspects were finally given the right to consult with a lawyer *at the beginning of the garde à vue*.[31] But the exceptional *garde à vue* regime also remained in place. Further exceptions were introduced[32] until *Salduz* caused a true legal earthquake in France, with the unexpected effect of statutory recognition of the right of suspects to be *assisted* by a lawyer *during* questioning by the police.

From this historical snapshot, it becomes evident that Scotland and France have strongly resisted lawyers entering the police station. In France, of course, since the 2000 legislation suspects were entitled to meet with a lawyer at the beginning of the *garde à vue*, whereas suspects in Scotland were until the 2010 reform questioned without receiving any legal advice. But consultation in France could not last for more than 30 minutes and did not apply until extremely late in the process in a whole range of offences. Against the backdrop of such common opposition to legal advice and assistance at the police station, it is intriguing to observe the differences and similarities in the Scottish and French legislation that now gives effect to such rights.

"Enter the police station"

The right to a private consultation

The 2010 Act gave suspects in Scotland the right to have a private consultation with a solicitor *before any questioning* by the police begins and *at any other time during such questioning*.[33] In view of the pre-existing status quo, this was a radical reform. But the French legislation of April 2011 went further. It provided suspects with the right to be assisted by a lawyer *from the beginning* of the *garde à vue*,[34] which means from the moment that the suspect is detained at the police station for any investigative purposes required.[35] This means that assistance is available *regardless of questioning*.[36] This is the position that the Carloway Review recommends should now be adopted in Scotland.[37] The Review stresses that this

[29] Loi n° 93-1013 du 24 août 1993 modifiant la loi n° 93-2 du 4 janvier 1993 portant réforme de la procédure pénale. See art.63-4 CPP as amended by the Law of August 24, 1993.

[30] This applied to organised crime, terrorism and drug related offences. See art.63-4 CPP, as amended by the Law of August 24, 1993.

[31] Loi n° 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes. See art.63-4 CPP as amended by the Law of June 15, 2000.

[32] See art.63-4 CPP, modified by the Law of March 9, 2004.

[33] Criminal Procedure (Scotland) Act 1995 s.15A, as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).

[34] Article 63-3-1 CPP, as inserted by the Law of April 14, 2011 art.6.

[35] See art.62-2 CPP, as inserted by the Law of April 14, 2011 art.2.

[36] More generally, the Law of April 2011 attempts to disconnect the *garde à vue* from questioning, defining it (art.62-2 CPP, as inserted by the Law of April 14, 2011) as a coercive measure that allows the police to retain the suspect at their disposal in order to achieve one of the strictly enumerated objectives, such as stop him from tampering with evidence or to allow for the investigations that require his presence and participation. As Roujou de Boubée notes, questioning can no longer be seen but as a secondary function of the *garde à vue*. G. Roujou de Boubée, "La réforme de la garde à vue (commentaire de la loi n° 2011-392 du 14 avril 2011)", Recueil Dalloz 2011, p.1570 at p.1572.

[37] *The Carloway Review, Report and Recommendations*, p.167. See also Ferguson and Raitt, "A Clear and Coherent Package of Reforms?" [2012] Crim. L.R. 909, 913, who consider that the current solution "can be criticized on the basis that the police can garner incriminating evidence from a suspect through other means".

 © 2013 Thomson Reuters (Professional) UK Limited

would be consistent with ECHR jurisprudence[38] and the proposed EU Directive on the Right of Access to a Lawyer.[39] The French example adds further support to this recommendation.

On the other hand, French law offers very little protection to persons who are not yet suspected of the commission of an offence and to those who may be suspected but are voluntarily attending the police station. The former can be questioned for four hours and have no right to have a consultation with a lawyer.[40] The latter are also questioned without a lawyer, for as long as they decide to remain at the police station. This is very problematic given that these are suspected persons who would otherwise be subjected to a *garde à vue*, with the consequence of being entitled to exercise the relevant procedural rights. Furthermore, the law does not provide any guarantees that the suspects' consent to questioning is genuinely *free* and *informed*. In reality, suspects questioned in this way find themselves in a legal limbo, reminiscent of the times when there was no access to a lawyer in the *garde à vue*. And yet the *Conseil constitutionnel* has recently made a finding of constitutionality regarding this practice.[41] It did hold that once suspicion arises from questioning, the suspect must be informed of the date and nature of the suspected offence and of his right to leave the police station at any time. But the court did not require that the suspect be informed of the right to legal advice.[42] Thus, the *Conseil's* decision went against the tide of the recent progressive reforms that, ironically, the *Conseil* had initiated itself.[43] Here there is a clear difference with Scotland, where persons attending voluntarily at a police station or other place for the purpose of being questioned enjoy the same right to have access to a solicitor as those who are detained at the police station.[44]

Attention must now be paid to what "assistance from the beginning of the *garde à vue*" actually entails. It is, first of all, a right to consult with a lawyer, in conditions that guarantee the confidentiality of the consultation between the lawyer and the suspect.[45] The Law of April 2011 changes nothing in this respect. The consultation is still allowed for a maximum 30 minutes, while a second consultation, of the same duration, can only take place when the *garde à vue* is extended beyond the 24-hour time limit.[46] Private consultation is therefore strictly regulated. Suspects are entitled to two 30-minute consultations in 48 hours of interrogation. The Scottish legislation, on the other hand, does not regulate the duration and frequency of consultations. The suspect has the right to have a private consultation prior to and at any point during questioning. Taken at face value, the provision is "simple enough",[47] but one might imagine situations where its flexibility could create

[38] *Dayanan v Turkey*, 7377/ 03 (ECtHR, October 13, 2009) at [32].

[39] EU Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326, 8/6/2011, art.4. For the revised text, see Council of the European Union 7337/12, March 9, 2012.

[40] Article 62 CPP, as inserted by the Law of April 14, 2011 art.14.

[41] See H. Matsopoulou, "Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution", Recueil Dalloz 2011, p.3035. See also O. Bachelet, "Admission, sous réserve, de l'audition libre dans l'enquête préliminaire", in *Lettre 'Actualités Droits-Libertés' du CREDOF*, 11 juillet 2012.

[42] Conseil constitutionnel, Décision n° 2011-191/194/195/196/197-QPC du 18 novembre 2011, considérant 20.

[43] E. Vergès, "Garde à vue: le rôle de l'avocat au cœur d'un conflit de normes nationales et européennes", Recueil Dalloz 2011, p.3005.

[44] Criminal Procedure (Scotland) Act 1995 s.15A, as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).

[45] Article 63-4 CPP, as inserted by the Law of April 14, 2011 art.7.

[46] Article 63-4 CPP, as inserted by the Law of April 14, 2011 art.7.

[47] F. Stark, "The Consequences of Cadder" (2011) 15 Edin. L.R. 293, 295.

practical problems, for instance if a suspect kept making new requests for private consultations or if he complained about the short duration of such consultations. The French solution alleviates such risks. It is a separate issue that two 30-minute consultations in 48 hours of interrogations can hardly allow for effective legal assistance.[48] Viewed from Scotland, the French solution might seem as too restrictive of suspects' opportunity to meet with their lawyer. Nonetheless the crucial question is how the Scottish rule will be applied in practice. There is currently too much scope for the abuse of the right to consultation, either on the part of the suspect or the police.

The right to have a lawyer present when questioned by the police

This brings us to the issue of suspects having their lawyer present during, as opposed to before or between, questioning by the police. The issue was barely touched upon in *Cadder* and the subsequent Scottish reform, whereas in France it was at the very centre of the debate on the *garde à vue*. France was already recognising the right to a private consultation from the beginning of the *garde à vue*, yet its regime of custodial legal assistance was found to be in breach of the right to fair trial in *Brusco*, where the ECtHR held that "a person subjected to a *garde à vue* has the right to be assisted by a lawyer from the beginning of this measure as well as *during questioning*".[49] Assistance has to be effective; the lawyer must be allowed to play his role fully. This was Strasbourg's message in *Brusco*, according to Renucci.[50] An opportunity merely to consult with the suspect for a brief period of time, restricting the lawyer to providing the suspect with emotional support and informing him of his procedural rights, was no longer consistent with the ECHR.[51] The *Conseil constitutionnel* had already pointed in that direction,[52] then, only a few days after *Brusco*, the *Cour de cassation* provided full confirmation that for fair trial requirements to be satisfied, the suspect must not be questioned in the absence of his lawyer.[53] This jurisprudence was quickly integrated into the Bill that became the Law of April 2011, which now gives any person subjected to a *garde à vue* the right to "ask that the lawyer assists him *during questioning*".[54] This was the most highly anticipated reform introduced with the new legislation.[55] By way of contrast, the Scottish 2010 Act introduced a right to consultation prior to and during questioning, but not a right to have a lawyer present at the time when questioned by the police. This does not mean that a request for legal assistance during questioning would be necessarily denied,[56] but there is nothing in the 2010 Act obliging the police to provide the suspect with such assistance either.

The divide between Scotland and France on this point becomes even wider if one also takes into consideration that the Scottish Act does not require that a lawyer

[48] The lack of legal assistance other than in these two consultations has indeed been found to be incompatible with art.6 ECHR and the French Constitution. *Brusco v France* (1466/07) (ECtHR, October 19, 2010) at [45].

[49] Emphasis added. *Brusco v France* (1466/07) (ECtHR, October 19, 2010) at [45].

[50] J.-F. Renucci, "Garde à vue et CEDH: la France condamnée à Strasbourg", Recueil Dalloz 2010, p.2950.

[51] See J.-F. Renucci, "L'avocat et la garde à vue: exigences européennes et réalités nationales", Recueil Dalloz 2009, p.2897.

[52] Conseil constitutionnel, Décision n° 2010-14/22 QPC du 30 juillet 2010 at [28].

[53] Crim. 19 octobre 2010, Bull. Crim. 163.

[54] Art. 63-4-2 CPP, as inserted by the Law of April 14, 2011 art.8.

[55] G. Roujou de Boubée, "La réforme de la garde à vue", Recueil Dalloz 2011, p.1570 at p.1573.

[56] J. Chalmers and F. Leverick, "'Substantial and Radical Change': A New Dawn for Scottish Criminal Procedure?" (2012) 75(5) M.L.R. 837, 846.

physically attends the police station;[57] "the right is merely to a *consultation*",[58] and this "does not have to occur face to face".[59] "Consultation" is defined by the 2010 Act as "consultation by such means as may be appropriate in the circumstances, and includes, for example, consultation by means of telephone".[60] This must also be seen in the context of current practice in Scotland, where legal advice is often given over the phone.[61] The Carloway Review seems to have placed equally little emphasis on the need for the lawyer's personal attendance at the police station, underlining that, in many cases, legal advice could be given much more quickly and more effectively by telephone call or over an internet video link.[62] On the contrary, in France, there is no reference to telephone consultation in the relevant legislation and no apparent reliance on it in practice, while the issue has been ignored in debates around the reform of the *garde à vue*.

One issue that has been the main cause of concern in France—the questioning of the suspect in the absence of a lawyer—has received virtually no attention in Scotland, despite the fact that both countries changed their legislation in response to the same Strasbourg jurisprudence. Perhaps the fact that France had already recognised a (limited) right to consultation meant that the ground was fertile for a more radical incorporation of the right to effective legal assistance. In any case, the French solution provides a useful prism for exploration of further reforms that might be required in Scotland. It is abundantly clear, anyway, that in the context of the French reform the role of custodial legal assistance has been construed more widely than that in Scotland. Leverick's distinction between a right to legal *advice* and a right to legal *assistance* quite accurately reflects the divergent Scottish and French approaches[63]; by the simple fact of being entitled to be present during questioning, lawyers in France are now being expected to play a more important role in the *garde à vue* than simply advising the suspect.

The role of the lawyer during custodial interrogation

Developing this point further, it is instructive to look at a report published by the *Conseil national des barreaux* (National Council of Bar Associations) shortly after the Law of April 2011 came into force. The report sees the first mission of the lawyer as verifying the legality of the *garde à vue* and checking material conditions at the police station. Then the lawyer has the fundamental role of making sure that the suspect exercises his rights. In the confidential one-to-one consultation, the lawyer must discuss with the suspect his treatment by the police and inform him of the various stages of the process as well as his procedural rights. During questioning, the lawyer can remind the suspect of his right to remain silent, ask the police to reformulate questions that the suspect may not understand and ensure

[57] Stark, "The Consequences of Cadder" (2011) 15 Edin. L.R. 293, 295.
[58] F. Leverick, "The Right to Legal Assistance During Detention" (2011) 15 Edin. L.R. 352, 360.
[59] Leverick, "The Right to Legal Assistance During Detention" (2011) 15 Edin. L.R. 352, 360.
[60] Criminal Procedure (Scotland) Act 1995 s.15A(5), as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).
[61] P.R. Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 754, citing P. Nicholson, "Rights Under Question" (2010) J.L.S.S. 12.
[62] *The Carloway Review, Report and Recommendations*, para.6.1.40. Ferguson and Raitt question whether continuing with the norm of telephone advice in all but the most serious cases is consistent with recent ECHR jurisprudence and the proposed EU Directive on the Right of Access to a Lawyer. Ferguson and Raitt, "A Clear and Coherent Package of Reforms?" [2012] Crim. L.R. 909, 914.
[63] Leverick, "The Right to Legal Assistance During Detention" (2011) 15 Edin. L.R. 352, 354.

that the police have made an accurate record of statements made by the suspect.[64] Thus conceived, the role of the lawyer in police stations in France is much more extensive than the role of the lawyer in police interrogations in Scotland. As regards the role of the lawyer during questioning, however, it is difficult to escape the conclusion that the report engages in "wishful thinking". The Law of April 2011 allows the lawyer to be present during the interview, but forbids him from asking any questions before the police have finished interviewing the suspect.[65] It also gives the police the right to block the lawyer from asking any questions even at the end of the interview, if the questions are seen as potentially damaging for the investigation.[66] The police are also entitled to put an immediate end to the interview, at any time, for the ambiguous reason of facing a difficulty, in which case they can ask the president of the local bar association to designate another lawyer.[67] It remains to be seen how widely the power to exclude the lawyer from questioning will be exercised in practice, but there is no denying that it subjects the lawyer to the constant threat of being evicted from the process if he does not "behave". So the lawyer is only allowed to take notes during the interview and submit written observations in the end, which can be addressed to the prosecutor who supervises the *garde à vue*.[68] The lawyer's role is therefore anything but adversarial. As Vergès eloquently put it:

> "The 2011 legislation made manifest a real suspicion towards the lawyer who assists in the *garde à vue*. Far from exercising an active defence role, the lawyer is confined to being an audience member".[69]

So despite the recent reforms provoked by Strasbourg, the French system of custodial interrogation has still not achieved full harmony with ECHR jurisprudence.[70] According to *Dayanan v Turkey*, a suspect should be able to

> "obtain the whole range of services specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person's defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention."[71]

This means that the lawyer must be able to organise the suspect's defence freely, playing an active role throughout the *garde à vue*,[72] which is currently not the case in France given the restrictions applying to the lawyer's participation in questioning. But by the same token it can be said that by giving the suspect access to legal

[64] Conseil national des barreaux, Assemblée générale des 8 et 9 juillet 2011, *Première définition du rôle de l'avocat pendant la garde à vue*, available at *http://cnb.avocat.fr/Role-de-l-avocat-intervenant-pendant-la-garde-a-vue-premiere-definition-en-forme-de-vade-mecum-a-l-usage-de-la_a1102.html* [Accessed February 20, 2013], pp.4–12.
[65] Article 63-4-3 CPP, as inserted by the Law of April 14, 2011 art.8.
[66] Article 63-4-3 CPP, as inserted by the Law of April 14, 2011 art.8.
[67] Article 63-4-3 CPP, as inserted by the Law of April 14, 2011 art.8.
[68] Article 63-4-3 CPP, as inserted by the Law of April 14, 2011 art.8.
[69] E. Vergès, "Garde à vue: le rôle de l'avocat au cœur d'un conflit de normes nationales et européennes", Recueil Dalloz 2011, p.3005.
[70] See H. Matsopoulou, "Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution", Recueil Dalloz 2011, p.3035.
[71] *Dayanan v Turkey* (7377/03) (ECtHR, October 13, 2009), para.32.
[72] H. Matsopoulou, "Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution", Recueil Dalloz 2011, p.3035 at p.3038.

advice from the beginning of the *garde à vue* and by allowing him to be assisted by a lawyer during questioning, though clearly not in adversarial terms, French law now goes *some way* towards allowing the suspect to obtain "the whole range of services associated with legal assistance",[73] and towards convergence with the proposed EU Directive on the Right of Access to a Lawyer, which defines "access" as entailing the presence and *participation* of the lawyer in official interviews.[74] The same is not necessarily true of Scottish law. The new regime may or may not prove consistent with *Dayanan* and the proposed EU Directive, depending on how the police treat suspects' requests to be assisted by a lawyer during questioning in practice.

These observations are of topical interest in view of the fact that the Carloway Review was of the opinion that the role of the lawyer in providing advice does not need to be set in legislation.[75] However, this leaves too much to be determined by the way the police decide to exercise their discretion. The example of the French experience provides a useful contrast of a clearer framework for custodial legal assistance. Then again, what the French legislator gave with one hand—the right to be present during the questioning of the suspect—he took away with the other, by restricting the lawyer to a passive role during questioning.

Delaying questioning to allow access to legal advice

Once a suspect in France has asked that a lawyer assist him in interrogations, questioning cannot be initiated, in the absence of a court-appointed lawyer or a lawyer appointed by the suspect, before the expiry of *a period of two hours*. In cases where the lawyer arrives after the two hours have elapsed, the questioning has to cease, if the suspect makes such a request, to allow for a 30-minute private consultation with the lawyer.[76] Contrarily, there is no fixed rule in Scottish law on how long the police must wait for the suspect to receive advice or for the lawyer to arrive at the police station, and on whether they can start questioning the suspect in the absence of the lawyer after a certain period of time. The 2010 Act said nothing on the topic. The Carloway Review considered that a period of one hour would be reasonable in urban areas and two hours would be acceptable in rural areas. However, it approved of the current flexible approach, noting that no legislation is required and advocating consideration of various factors such as distance, availability of transport and prevailing weather conditions.[77] Again, this approach leaves too much to be determined by the way the police decide to exercise their power to initiate the interrogation of the suspect. It also creates the risk that different trial judges will come to different conclusions as to whether the police have waited for the period of time reasonably required before questioning the suspect, which might create inconsistency at the level of admissibility of any confessional evidence obtained thereby.

[73] *Dayanan v Turkey* (7377/03) (ECtHR, October 13, 2009), para.32.

[74] EU Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest, COM (2011) 326, 8/6/2011, art.3.

[75] *The Carloway Review, Report and Recommendations*, para.6.1.35.

[76] Article 63-4-2 CPP, as inserted by the Law of April 14, 2011, art.8.

[77] *The Carloway Review, Report and Recommendations*, paras 6.1.29–6.1.32.

Withholding access to legal advice

In exceptional cases, questioning can start in the absence of the appointed lawyer in both Scotland and France. In France, the two-hour time limit does not apply when the *necessities of the investigation* require that the suspect be questioned immediately.[78] Not only this, there is also the power to defer the presence of the lawyer at questioning for 12 hours and, in more serious cases, for a whole 24 hours, in order to collect or preserve evidence, or in order to prevent an imminent attack upon other persons.[79] In Scotland, in *exceptional circumstances*, the questioning can begin or continue without the suspect having had a private consultation with a solicitor, so far as it is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders.[80] The Carloway Review considered that there is no need for a statutory definition here.[81] When Lord Carloway appeared before the Justice Committee in the Scottish Parliament, he explained that "exceptional" meant "very rare", "extreme" circumstances, not applying to "run-of-the-mill cases".[82] He admitted that the police or the prosecution might in some cases try to argue that there were exceptional circumstances, but offered a prognosis that "the courts will be pretty firm in this area".[83] A constable may also delay intimation of detention to a solicitor, for the same reasons that justify initiating questioning without prior consultation.[84] In brief, in both countries there is a risk that the right will be undermined in practice, mainly as a result of the vague and subjective nature of the rules allowing the police to withhold access to legal advice. By providing for a restriction of this right for up to 24 hours in some cases, France, in particular, goes too far in prioritising the interests of the police.

The comparison of the legislative reforms in Scotland and France raises a number of interesting questions about the scope of the right to legal assistance generally. Valuable lessons can be learned from such comparison, especially at a time when the Scottish government is planning to introduce new legislation, following the Carloway Review and consultation, and when there are renewed calls in France for amendments to the April 2011 legislation in order to bring the *garde à vue* closer to the European paradigm.[85] In addition to pinpointing specific legal reforms, comparative analysis also allows for some more general observations on the issue of recognition of the right to custodial legal assistance.

[78] In this case the police need to get written authorisation from the *procureur de la République*. See art.63-4-2 CPP, as inserted by the Law of April 14, 2011, art.8.

[79] Article 63-4-2 CPP, as inserted by the Law of April 14, 2011, art.8.

[80] Criminal Procedure (Scotland) Act 1995 s.15A(7)(b), as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).

[81] *The Carloway Review, Report and Recommendations*, para.6.1.33.

[82] The Scottish Parliament, Justice Committee, *Carloway Review*, November 29, 2011, p.548.

[83] The Scottish Parliament, Justice Committee, *Carloway Review*, November 29, 2011, p.549.

[84] See Criminal Procedure (Scotland) Act 1995 s.15A(7)(b), as inserted by Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 s.1(4).

[85] J. Alix, "Les droits de la défense au cours de l'enquête de police après la réforme de la garde à vue: état de lieux et perspectives", Recueil Dalloz 2011, p.1699; H. Matsopoulou, "Les dispositions de la loi du 14 avril 2011 sur la garde à vue déclarées conformes à la Constitution", Recueil Dalloz 2011, p.3035 at p.3036.

Criticism of Cadder revisited

A recent *Criminal Law Review* article offering an analysis of the "repercussions" of *Cadder* made four criticisms in relation to recognition of the right to legal assistance in this case.[86] These will now be revisited in the light of similar judicial and legislative developments in France leading to recognition of the right to legal assistance there.

The first criticism was that the Supreme Court had read *Salduz* too widely, by not treating "a right to legal advice as part of the more general right against *compelled* self-incrimination".[87] The Supreme Court was perfectly clear on this point. "The emphasis" in *Salduz* was on "the presence of a lawyer as a necessary safeguard to ensure respect for the right of the detainee not to incriminate himself",[88] and not on the elimination of "the risk of ill-treatment or other forms of physical or psychological pressure as a means of coercing the detainee to incriminate himself".[89] This interpretation finds support in the jurisprudence of the French *Cour de cassation*, according to which art.6 required not just the presence of the lawyer and consultation with the suspect, but legal "assistance in conditions allowing the lawyer to organise the defence of the suspect and prepare him for the interrogations"[90] in which the lawyer must be able to participate.[91] The *Cour de cassation* adopted a reading of art.6 that went beyond *Salduz* to mirror *Dayanan*, in finding that the suspect should obtain the "whole range of services specifically associated with legal assistance".[92] In other words, the court defined the scope of the right to legal advice as extending far beyond protection of the right against *compelled* self-incrimination; notifying the suspect of his right to silence and helping him make informed choices about how to exercise it is an important aspect of custodial legal assistance, but so is helping the suspect enforce his rights.[93] From this point of view, the argument that *Cadder* interpreted ECHR jurisprudence *too broadly* loses force. The Supreme Court's interpretation seems relatively narrow in comparison to that adopted by the *Cour de cassation*. This observation becomes even more interesting if one accepts White's and Ferguson's argument that in the "sons of *Cadder*" cases the Supreme Court retreated from the broader position it had adopted in *Cadder* in relation to the right against self-incrimination.[94]

The second criticism followed from the first. The argument was that if it is accepted that the right to legal assistance is derived from the right against *compelled* self-incrimination—rather than the right against self-incrimination—then it also has to be accepted that access to a lawyer may be seen as a *desirable* safeguard but not necessarily as a *mandatory* one.[95] The right against *compelled*

[86] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743.
[87] White and Ferguson, "Sins of the Father? The 'Sons of Cadder'" [2012] Crim. L.R. 357, 358, summarising the argument made in the earlier article.
[88] *Cadder* [2010] UKSC 43 at [35].
[89] *Cadder* [2010] UKSC 43 at [34].
[90] Crim. 19 octobre 2010, Bull. crim. 163, pp.674–675.
[91] Communiqué, Chambre criminelle, arrêts 19 octobre 2010, available at *http://www.courdecassation.fr/jurisprudence_2/chambre_criminelle_578/arrets_rendus_17837.html* [Accessed February 20, 2012].
[92] Crim. 19 octobre 2010, Bull. crim. 163, p.674.
[93] See E. Gindre, "Une révolution jurisprudentielle en trompe l'œil: les décisions de non conventionalité des régimes de garde à vue au regard des droits de la défense", RSC 2010, p.879, at pp.884–889. For analysis of these different aspects of the right to legal assistance see Leverick, "The Right to Legal Assistance During Detention" (2011) 15 Edin. L.R. 352, 365–371.
[94] White and Ferguson, "Sins of the Father? The 'Sons of Cadder'" [2012] Crim. L.R. 357.
[95] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 751.

self-incrimination can be protected in other ways, as observed by the High Court of Justiciary in *McLean*, if "other safeguards to secure a fair trial … are in place", notwithstanding that a lawyer is not provided during custodial interrogation.[96] As specified in *McLean*, the safeguards otherwise available in Scottish criminal procedure included the right of the suspect to be cautioned of the right to silence; the right to intimation of detention to a solicitor; the fact that no questioning is allowed after caution and charge; the audio and video recording of the interview in serious cases; the prohibition of coercion and unfair treatment as well as the fact that evidence thus obtained will be rendered inadmissible; the existence of an absolute right to silence and lack of adverse inferences, the corroboration requirement and the fact that a person may not be detained for more than six hours from the moment of detention.[97] Now, in *Cadder*, the Supreme Court recognised that if access to legal assistance, as understood in *Salduz*, was about protecting the right against *compelled* self-incrimination, then "it might have been thought that the use of techniques such as tape-recording would meet the need to monitor the need for fairness", but since *Salduz*'s emphasis was on the right against self-incrimination, then there was no possibility of resorting to such analysis.[98] "The guarantees otherwise available [were] entirely commendable",[99] but, at the same time, "beside the point".[100]

At this point we can draw an analogy with recognition of the right to legal assistance in France, where "the extended availability of custodial legal advice [had] been rejected as unnecessary [in the past] on the grounds that the existing system of judicial supervision [provided] adequate protection".[101] In fact, at the time of recognition of the right to legal assistance in France, French criminal procedure provided at least as complete a system of "guarantees otherwise available" as Scottish criminal procedure: the right to intimation of detention; the audiovisual recording of interviews in serious cases; the prohibition of coercion and unfair treatment; an absolute right to silence and the absence of a power to draw adverse inferences from its exercise as well as the existence of procedural nullities invalidating acts that breach rights applying at the *garde à vue*, which is the Continental law equivalent of excluding confessional evidence obtained in violation of the rights of the suspect.[102] Of course, French criminal procedure lacked

[96] *HM Advocate v McLean* [2009] HCJAC 97, 2010 S.L.T. 73 at [31].
[97] *HM Advocate v McLean* [2009] HCJAC 97, 2010 S.L.T. 73 at [27].
[98] *Cadder* [2010] UKSC 43 at [34].
[99] *Cadder* [2010] UKSC 43 at [50].
[100] *Cadder* [2010] UKSC 43 at [66].
[101] J. Hodgson, *French Criminal Justice—A Comparative Account of the Investigation and Prosecution of Crime in France* (Oxford and Portland, Oregon: Hart Publishing, 2005), p.151.
[102] The last point about exclusion is an important one, especially if one takes into account the jurisprudence that the *Cour de cassation* has developed since the beginning of the 90s, which has progressively replaced the power to exercise judicial discretion in this area with automatic "exclusion". Put differently, in comparison to Scotland's system of discretionary exclusion, exclusion for certain violations of the *garde à vue* has long been automatic in France, which can be seen as another important "guarantee otherwise available" of procedural fairness. On the automatic procedural nullities in France see generally B. Bouloc, "Observations sur les nullités en matière de procédure pénale" in Mélanges offerts à Pierre Couvrat, *La sanction du droit*, PUF, Paris (2001), p.417; A. Decocq, J. Montrevil et J. Buisson, *Le droit de la police*, 2ème éd., Litec (1998), p.818; P. Delage, "La sanction des nullités de la garde à vue : de la sanction juridictionnelle à la sanction parquetière", *Archives de politique criminelle* 2006, p.137; E. Molina, *La liberté de preuve des infractions en droit français contemporain*, Presses Univérsitaires d'Aix-Marseille, Aix-en-Provence (2001); J. Pradel, "*Nullité d'une procédure pour défaut d'enregistrement de l'interrogatoire d'un mineur en garde à vue* ", D. 2007, p. 2141. For examples of the automatic nullities jurisprudence see Crim. 29 février 2000, Bull. crim. nº 93, *Dr.pénal*, juin 2000, nº 80, (2000) 3 *Poiniki Dikeosini* 861, comment D. Giannoulopoulos (in Greek); Crim 20 mars 2007, Bull. crim. nº 85; Crim. 3 avril 2007, Bull. crim. nº 104; Crim. 24 juin 2009, Bull. crim. nº 136; Crim. 3 mars 2010, Bull. crim. nº 47. On discretionary exclusion in Scotland see generally F. Stark and

some of the fair trial guarantees applying at police stations in Scotland, notably the duty to notify suspects of their right to silence, the corroboration requirement and prohibition of post caution and charge questioning, and not allowing for long periods of detention. But, on the other hand, France was giving suspects *some* access to legal advice—the two 30-minute private consultations—and entrusted the prosecutor with judicial supervision of the process. This was *a fortiori* the case in interrogations carried out by the investigating judge (*Juge d'instruction*), where the suspect has always been able to exercise a much wider range of defence rights, including being assisted by a lawyer during questioning. And yet, these fair trial guarantees were not given any consideration in the *Conseil constitutionnel* and *Cour de cassation* jurisprudence recognising the right to legal assistance. It can be assumed that, in the light of *Salduz*, they were seen as "beside the point". This is particularly significant if we consider that French pre-trial procedure is strongly rooted in the inquisitorial tradition[103] and that recognition of the right to legal assistance has been strongly resisted in the past. To put it differently, against the backdrop of inquisitorialism and resistance, one might expect the "guarantees otherwise available" argument to resonate well with those opposed to recognition of the right to legal assistance, and yet no one seemed to consider that the ECtHR's jurisprudence could be bypassed in this way.

A third criticism was that "the unintended legacy of *Cadder* may be the dismantling of key protections for accused persons within the Scottish system of criminal procedure".[104] Ferguson pinpointed that suspects' liberty had already been curtailed, with a doubling of the permissible period of detention. She predicted a likely loss of the Scottish caution and corroboration requirement, and the introduction of a power to draw adverse inferences.[105] Leverick has expressed similar concerns regarding the drawing of adverse inferences,[106] while Raitt saw potential reforms as an attempt to "re-balance" the system, giving the impression of a *quid pro quo*.[107] The Carloway Review proved such concerns right with respect to corroboration,[108] but rejected the possibility of drawing adverse inferences from silence.[109] Interestingly, a *quid pro quo* response to recognition of the right to legal assistance cannot be traced in France, despite the fact that France went further than Scotland in legislating for a right to have a lawyer present during questioning and despite the inquisitorial culture pervading French pre-trial proceedings. Recent validation by the *Conseil constitutionnel* of the practice of depriving suspects voluntarily attending the police station of the right to legal assistance is, of course, highly indicative of an effort to minimise the effect of the application of such a right. The same can be said of the wide powers to delay or withhold exercise of the right as well as of the passive role prescribed for lawyers during questioning. But reactions to recognition of the right to legal assistance have not gone so far as to trigger legislation that would remove guarantees otherwise available. So, if

F. Leverick, "Scotland: A Plea for Consistency" in S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law* (Heidelberg, New York, London: Springer, 2013) 69.

[103] See generally J. Hodgson, "The Role of the Criminal Defence Lawyer in an Inquisitorial Procedure: Legal and Ethical Constraints" (2006) 9 *Legal Ethics* 125.

[104] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 756.

[105] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 756.

[106] F. Leverick, "The Supreme Court Strikes Back" (2011) 15 Edin. L.R. 287, 292.

[107] F.E. Raitt, "The Carloway Review: An Opportunity Lost" (2011) 15 Edin. L.R. 427, 430.

[108] *The Carloway Review, Report and Recommendations*, pp.255–286.

[109] *The Carloway Review, Report and Recommendations*, pp.315–328.

France has managed to absorb the effects of recognition of the right to legal assistance without introducing legislation taking away other procedural guarantees, why is this not conceivable in Scotland? In any case, it is submitted that the *quid pro quo* argument must be seen as criticism of the Government for its knee-jerk reaction to ECtHR enhancement of suspects' rights and not as criticism of the jurisprudence that has caused such a reaction.

Finally, *Cadder* was criticised for treating ECHR jurisprudence as a means of homogenisation rather than harmonisation of European criminal procedures.[110] From a different angle, however, this criticism can be seen as a defence of pre-*Cadder* isolationism of Scottish criminal procedure; the isolationism that Lord Hope took issue with, by noting that it was remarkable that, until quite recently, nobody thought there was anything wrong with the procedure of interviewing suspects without access to legal advice.[111] It took the Supreme Court's cosmopolitan approach in *Cadder* to break with such isolationism.[112] France had long adopted a similarly idiosyncratic position in this area.[113] As in the UK with *Cadder*, here also it was the judiciary's cosmopolitanism that opened up new horizons for suspects' rights in custodial interrogation. Space precludes a discussion of the benefits of such cosmopolitan legal vision. But it needs stressing that had it not been for such vision, both Scotland and France would most probably still be out of tune with current thinking in Europe. Moreover, the fact that the Supreme Court has been in good company in giving effect to ECHR jurisprudence adds in itself support to adopting such an approach. The dilemmas that Scottish courts were facing — such as that "there are limits to harmonization"[114] and that Strasbourg should "not dictate how Member States should conduct their criminal procedures, so long as, ultimately, each trial/ process is a fair one"[115]—were no less present for French courts, yet this did not preclude the latter from giving effect to ECHR jurisprudence. For the sake of completeness, it can be mentioned here that the same thing happened to different degrees in Belgium and the Netherlands.[116] In other words, ECHR jurisprudence was applied with more or less the same force in the majority of member states which prior to *Salduz* did not afford a right to legal assistance at interview.[117]

Conclusions and lessons for England and Wales

This article has put into comparative perspective the recent reforms of custodial legal assistance in Scotland and France. From this perspective, it may be possible to obtain a new understanding of the nature and scope of the procedural rights introduced with these reforms. For example, recognition in Scotland of a right to

[110] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 754.

[111] *Cadder* [2010] UKSC 43 at [66].

[112] See E. Bjorge, "Exceptionalism and Internationalism in the Supreme Court: *Horncastle* and *Cadder*" [2011] P.L. 475. For a discussion of legal cosmopolitanism see P. Roberts, "Rethinking the Law of Evidence: a Twenty-First Century Agenda for Teaching and Research" in P. Roberts and M. Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Proof* (Oxford: Hart Publishing, 2007), p.19.

[113] See generally my article on "Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance" (2013) 24 *Criminal Law Forum* (forthcoming).

[114] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 755.

[115] Ferguson, "Repercussions of the *Cadder* Case" [2011] Crim. L.R. 743, 755.

[116] On the Dutch reform see Supreme Court of the Netherlands, LJN BH3079, June 30, 2009; C. Brants, "The Reluctant Dutch Response to Salduz" (2011) 15 Edin. L.R. 298. On Belgium see Loi du 13 août 2011 available at *http://www.etaamb.be/fr/loi-du-13-aout-2011_n2011009606.html* [Accessed February 20, 2013].

[117] See *Cadder* [2010] UKSC 43 at [49].

consultation may now appear as less radical a reform than originally considered, if contrasted with enactment in France of a right to have a lawyer present during questioning. To take another example, the flaws of the French practice of depriving suspects voluntarily attending the police station of legal assistance may become more evident through a comparison with the Scottish rule that treats detained suspects and those voluntarily attending the police station alike. The article has also demonstrated that the Supreme Court's recognition of the right to legal assistance in *Cadder* was a justified response to ECHR jurisprudence, similar to that given by the *Conseil constitutionnel* and *Cour de cassation* in France, and that such recognition did not necessarily have to lead to *quid pro quo* reforms, dismantling key procedural guarantees; there was no evidence of such a trend in France. Finally, drawing an analogy with the French judiciary's response to *Salduz*, the article has argued that *Cadder* could be conceived as cosmopolitan jurisprudence breaking with Scottish isolationism in the field of police interrogation rather than the effect of a homogenisation agenda pushed forward by Strasbourg.

These comparisons are also of particular significance for England and Wales. On the one hand, they serve as a useful reminder of the radical character of the reforms introduced with the Police and Criminal Evidence Act 1984 (PACE), this "landmark statute in the development of the criminal justice system".[118] With PACE the right to legal consultation and right to have a lawyer present during questioning were implemented in England and Wales nearly 25 years prior to them being enacted into Scottish and French law respectively. Not only this, the Scottish and French reforms were met with considerable resistance, despite being long overdue. In fact, resistance led to substantial restrictions of the scope of the newly introduced rights in France, while it triggered consideration of reforms aimed at undermining other key rights of the defendant in Scotland. In other words, nearly 25 years after PACE, Scotland and France are still playing catch up with England and Wales in terms of fully recognising a right to custodial legal assistance. Of course, on the other hand, English law has since 1984 taken big steps backwards and away from the due process position it had adopted with PACE. A gradually increasing reliance on assigning custodial legal assistance to non-solicitor staff[119] and restricting opportunities for face-to-face consultation with legal counsel,[120] coupled with an ever-shrinking legal aid budget[121] and the use of a full-blown system of adverse inferences impacting upon lawyers' ability to adopt an adversarial approach to police interrogation,[122] perfectly illustrate this point. It is therefore arguable that just as Scotland and France are *finally* coming to terms with the need to provide suspects with effective legal assistance, England and Wales, a significant innovator in this area at a European and possibly global level, are backtracking on their due process commitments. This observation can in itself serve as a warning to England

[118] I. Dennis, "Editorial—Legal Advice in Police Stations: 25 Years on" [2011] Crim. L.R. 1.

[119] See J. Hodgson and L. Bridges, "Improving Custodial Legal Advice" [1995] Crim. L.R. 101, 102; R. Pattenden and L. Skinns, "Choice, Privacy and Publicly Funded Legal Advice at Police Stations" (2010) 73 M.L.R. 349, 352.

[120] See L. Bridges and E. Cape, *CDS Direct: Flying in the Face of the Evidence* (London: Centre for Crime and Justice Studies, King's College, 2008); P. Pleasence, V. Kemp and N. Balmer, "The Justice Lottery? Police Station Advice 25 years on from PACE" [2011] Crim. L.R. 6.

[121] See A. Edwards, "Legal Aid, Sentencing and Punishment of Offenders Act 2012—the Financial Procedural and Practical Implications" [2012] Crim. L.R. 584.

[122] See E. Cape, "The Rise (and Fall?) of a Criminal Defence Profession" [2004] Crim. L.R. 401, 414.

and Wales of the course they may be taking away from Europe, ironically at a time when we might be observing a coming together of suspects' rights in Europe.[123]

A Brief Rejoinder

This article offers useful insights into the French system. We are less familiar with that system than is the author, but it seems that until relatively recently it lacked a number of important safeguards. As the author explains, not only was there no legal assistance for suspects during police questioning, but they were not advised that they had a right not to respond to such questioning. Suspects could be detained and questioned for 36 hours, and sometimes for 72 hours. This is in marked contrast to the pre-*Cadder* Scottish detention period of six hours, with the maximum permitted extension being for a further six hours; suspects having to be told of their "right to silence" (on pain of inadmissibility), and of their right to inform a third party of their detention. The article also tells us that in France "persons who are not yet suspected of the commission of an offence ... can be questioned for four hours". Presumably such persons are (at least at this stage) potential witnesses. Again, this is in contrast to the Scottish position in which witnesses are required to provide the police with certain details (e.g. name, address, nationality) but cannot be detained for questioning. If European harmonisation means that Scottish pre-trial procedure becomes more like the French system, our worst fears will have been realised.

We are also unconvinced that the quid pro quo argument must be seen as a criticism of government, rather than of ECtHR jurisprudence. It is essential that those who commit crimes can be prosecuted and ultimately convicted. If a system makes this too difficult to achieve, it is a failure of justice. Given the large number of prosecutions which have had to be abandoned in Scotland as a result of Cadder, it was inevitable that the system would require to be "re-balanced" in favour of the public interest and/or victims. The concern is that in an attempt at re-balancing, adjustments such as the abolition of corroboration will go too far in the other direction, making suspects far more likely to suffer miscarriages of justice.

Pamela R. Ferguson and Robin White

[123] See A. Dorange and S. Field, "Reforming Defence Rights in French Police Custody: A Coming Together in Europe?" (2012) 16 E. & P. 153.